

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CONNIE CUMMINS)	
Claimant)	
VS.)	
)	
USD 250)	Docket No. 255,594
Respondent)	
AND)	
)	
KANSAS ASSOCIATION OF SCHOOL BOARDS)	
RISK MANAGEMENT)	
Insurance Carrier)	

ORDER

Claimant appeals the January 23, 2003 Award of Administrative Law Judge Jon L. Frobish. Claimant was awarded benefits for an 11 percent whole body functional impairment based upon the opinion of the independent medical examiner, Vito J. Carabetta, M.D. Claimant argues the opinion of Edward J. Prostic, M.D., the only health care provider to testify in this matter, is more credible, contending Dr. Prostic's 24 percent whole body impairment should be the basis for the award. The Appeals Board (Board) heard oral argument on July 8, 2003. Gary Peterson was appointed as Board Member Pro Tem for the purposes of this appeal.

APPEARANCES

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Frederick J. Greenbaum of Kansas City, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

What is the nature and extent of claimant's injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail, and it is not necessary to repeat those herein. The Board adopts the findings and conclusions of the Administrative Law Judge as its own.

Claimant, a 59-year old para-educator, was injured on May 14, 1998, while on route to the Kansas City Zoo. The vehicle she was riding in was struck from the rear. Claimant was seen at the emergency room at Mt. Carmel Medical Center and treated by William Sullivan, D.O. Claimant underwent conservative therapy, including trigger point injections, which provided little or no relief. Claimant then underwent treatment with Ellen Nichols, M.D., a neurosurgeon; Laurie Behm, M.D., a physical medicine and rehabilitation specialist; John Veitch, M.D., an orthopedic surgeon, who performed an arthrogram and anterior decompression and excision of the lateral clavicle; and C. Craig Satterlee, M.D., an orthopedic surgeon, who provided injections into the shoulder.

Claimant was diagnosed with several different conditions. Unfortunately, the majority of the treatment provided claimant resulted in little or no improvement. X-rays and MRIs performed on claimant indicated degenerative disc disease C4 through C6, with foraminal narrowing. Claimant was diagnosed with strains and sprains of the cervical spine by Edward J. Prostic, M.D., a board certified orthopedic surgeon. Dr. Prostic also diagnosed rotator cuff impingement and carpal tunnel syndrome.

A conflict arose between the various examining and treating physicians regarding whether claimant had radiculopathy in her upper extremities. Neurosurgeon Ellen Nichols, M.D., who examined claimant, found no evidence of myelopathy or radiculopathy in the upper extremities. Vito J. Carabetta, M.D., board certified in physical medicine and rehabilitation (the court-ordered independent medical evaluator), also failed to find any radiculopathy in the upper extremities.

Dr. Carabetta diagnosed regional myofascitis and post right shoulder decompression arthroplasty. In rating claimant, Dr. Carabetta utilized the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). He opined claimant fell within the DRE Category II, which equates to a 5 percent impairment to the

upper extremity at the shoulder. He also gave claimant a 10 percent impairment to the upper extremity at the level of the shoulder for the decompression arthroplasty. In utilizing the combined values chart, he found claimant to have suffered an 11 percent whole person impairment as a result of the upper extremity and cervical problems associated from this injury.

Dr. Prostic found claimant to have sustained a 15 percent permanent partial impairment to the body for the cervical radiculopathy and carpal tunnel syndrome, and an 18 percent impairment of the right upper extremity at the shoulder for the rotator-cuff-related surgery and its results. All combined, he imposed on claimant a 24 percent impairment to the body as a whole on a functional basis. While Dr. Prostic utilized the *AMA Guides* (4th ed.) in rendering his opinion, he did not utilize the DRE categories, instead relying upon claimant's limited range of motion in assessing the upper extremity impairments. The dispute between Dr. Nichols' findings, which were also utilized by Dr. Carabetta, and Dr. Prostic's findings centers, in part, around whether claimant suffered cervical radiculopathy. This was, in part, a basis for Dr. Prostic's cervical impairment rating. Additionally, Dr. Prostic found carpal tunnel syndrome, which was not diagnosed by either Dr. Nichols or Dr. Carabetta.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.¹ The Administrative Law Judge found the opinion of the independent medical examiner, Dr. Carabetta, to be the more credible. He also noted that Dr. Prostic examined claimant one time in February of 2001, while Dr. Carabetta examined claimant on one occasion in August of 2001. The later examination date allows greater weight be given Dr. Carabetta's opinion as to the ultimate permanency of claimant's condition. In so opining, he adopted Dr. Carabetta's impairment rating of 11 percent, which the Board also finds to be the most credible in this case.

The Board did note that claimant underwent cervical injections at one time. However, there was no indication in the record as to who performed the injections or for what reason they were provided. There is also no indication that EMGs were performed at any time in order to assess whether claimant, indeed, had radiculopathy associated with her condition. This lack of evidence hinders the Board's ability to truly assess claimant's full condition with regard to what, if any, cervical problems and associated radiculopathy she may have encountered.

The Board finds based upon the evidence in the record that claimant has suffered an 11 percent permanent partial impairment to the body as a whole based upon the opinion of Dr. Carabetta. In doing so, the Board affirms the Award of the Administrative Law Judge.

¹ See K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated January 23, 2003, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Director